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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT

IN

1. S.B. Criminal Appeal No.1112/2002

Smt. Maya Devi W/o Shri Gorpāl Khatri
Versus
The State of Rajasthan through Public Prosecutor

AND

2. S.B. Cr. Leave to Appeal No.43/2003

State of Rajasthan
Versus
Bhupenpal S/o Gorpāl

Date of Judgment :::: 20th April, 2007

PRESENT

Hon'ble Mr. Justice Narendra Kumar Jain

Smt. Gyanwati Dhakar, Counsel for accused appellant
Smt. Nirmala Sharma, P.P., for the State

//Reportable//

By the Court:-

The Additional District & Sessions Judge (Fast Tack), Baran, vide its judgment and order dated 6.8.2002, in Sessions Case No.125/2001, while acquitting the accused Bhupenpal S/o Gorpāl, convicted and sentenced the accused-appellant Mayadevi W/o Gorpāl, as under:-

<i>Under Section</i>	<i>Sentence</i>
304B, IPC	To undergo 10 years rigorous imprisonment and a fine of Rs.500/-, in default of payment of fine, to further undergo three months additional rigorous imprisonment
498A, IPC	To undergo one year's simple imprisonment and a fine of Rs.500/-; in default of payment of fine, to further undergo one month's additional simple imprisonment

Both the sentences were ordered to run concurrently.

Being aggrieved with the above judgment passed by the trial court, the accused-appellant Mayadevi challenged her conviction and sentence in S.B. Criminal Appeal No.1112/2002 and the State Government preferred Leave to Appeal against accused Bhupenpal S/o Gorpall. The leave to appeal has not been granted so far and the learned Public Prosecutor was also heard on it. Both the cases are directed against the common judgment passed by the trial court, therefore, they are being disposed of by this common judgment.

Exhibit P-10, a written-report, was lodged by PW-17 Dipankar Mandal at Police Station Bhanwargarh, wherein it was mentioned that his cousin-sister Rekha was married with Bhupenpal about one-and-half-year

ago; they used to quarrel with each other for demand of dowry. It was further stated that a day before the date of the incident a quarrel took place in between the mother-in-law and daughter-in-law. On 19th of September, 2000, at about 9.30 AM, poison was mixed in the rice and the same was given to Rekhadevi by her husband to eat. Thereafter poison was also administered to Rekha forcibly. Vishnu Sardar and Vibhuti Mandal were going to their agriculture field and when they were passing nearby the house of Rekha they heard some hue and cry. They entered the house of Rekha. She was alive and, on asking, she stated to Mukesh, Vishnu and Vibhuti about the incident. She was taken to Kelwada Hospital, where the Doctor declared her dead. Therefore, report be registered and action be taken according to law.

On the basis of above written-report, F.I.R. No.104/2000 (Exhibit P-11), was registered at Police Station Bhanwargarh, District Baran, under Section 304B, IPC. The accused Bhupenpal and Mayadevi, both, were arrested vide arrest-memo Exhibit P-12 and Exhibit P-13, respectively. The postmortem of deceased Rekha was conducted on 19.9.2000. The viscera was preserved and sent for chemical examination. Exhibit

P-14 is the FSL Report dated 14.11.2000.

After completion of investigation, the police filed a challan against both the accused-persons. The trial court framed charge against them for the offence under Sections 304B and 498A, IPC; the accused-persons denied the charge and claimed to be tried.

The prosecution, in support of its case, examined 18 witnesses and Exhibited 15 documents. The trial court recorded the statements of the accused-persons under section 313, Cr.P.C., wherein they stated that Rekha took poison at the agriculture field of her maternal-uncle Tapashrai and thereafter Tapashrai brought her dead-body to their residence. The accused Bhupenpal stated that he was in service at Kota and was not present on the day of the incident at his residence. He came back in the evening on receiving the message of the incident. The rice, mixed with poison, and small container, containing poison, were brought by Tapashrai to their residence. They were given beating by Tapashrai and they were locked. Their door was opened by the police. The accused, in defence, examined DW-1 Samiran and DW-2 Santosh Mandal.

The trial court, after considering the prosecution evidence, on the record, recorded a finding that the presence of accused Bhupen, at the place of incident, was doubtful and there is no consistent evidence against him with regard to the offence for which he has been charged, and consequently acquitted him; so far as accused Mayadevi is concerned, the trial court recorded a finding that charges framed against her are fully proved on the basis of the prosecution evidence and consequently convicted and sentenced her, as mentioned above.

The learned counsel for the accused-appellant Mayadevi contended that so far as death of Rekha within 7 years from the date of her marriage under abnormal circumstances is concerned, it is proved in the case, but there is no evidence of the prosecution to prove cruelty or harassment with Rekha by her husband or relatives of her husband soon before her death for or in connection with demand of dowry, therefore, presumption under Section 113-B of the Evidence Act cannot be raised against the accused-persons, and, in absence of any consistent evidence in respect of cruelty or harassment with Rekha soon before her death for or in connection with demand of

dowry, the offence under Section 304B IPC is not made out; and the learned trial court has committed an illegality in convicting the accused Mayadevi for the above offence.

It is further contended that so far as demand of motorcycle as stated by the prosecution witnesses is concerned, the same alone is not sufficient to prove the charge against the accused-appellant for the offence under Section 304B, IPC, as it is essential for the prosecution to prove that the deceased was subjected to cruelty or harassment soon before her death for or in connection with demand of dowry. If there was any cruelty or harassment with the deceased in respect of demand of dowry earlier, then, at the most, the charge under Section 498A, IPC, could have been found to be proved, and the trial court has already convicted the accused for the said charge, but the finding of the trial court in respect of offence under Section 304B, IPC, against Mayadevi is concerned, the same is contrary to facts and law, both, and the same is liable to be set-aside by this Court. It is further contended on behalf of the appellant that PW-17, who lodged FIR was declared hostile by the prosecution. The articles were not

sealed at the place of incident but the same were sealed at the police station and the said fact is clear from the statement of PW-15 Mukesh. She also referred the statement of PW-7 Bhaven Dhali, PW-8 Shishir, PW-10 Vibhuti Mandal and PW-11 Dulal Dhali, in support of her contention that there is no allegation of cruelty or harassment of Rekha by her husband or mother-in-law for or in connection with demand of dowry soon before her death. The statement of the prosecution witnesses were read during the course of arguments and number of contradictions were pointed out in the prosecution witnesses and on that basis it was contended that the prosecution has failed to prove the charge against accused Maya Devi for the offence under Section 304B, IPC, and she be acquitted.

The learned counsel for the accused-appellant has also referred the decision of the Hon'ble Supreme Court in Sunil Bajaj Vs. State of M.P., 2002 Cr.L.R. (SC) 225, and other judgments of this Court and contended that in absence of any specific evidence that Rekha was subjected to cruelty or harassment by her husband or her mother-in-law soon before her death for or in connection with the demand of dowry, the

conviction of the accused Maya Devi under Section 304B, IPC, cannot be sustained.

The learned Public Prosecutor supported the judgment of the trial court in respect of accused Maya Devi and contended that all ingredients of offence under Section 304B, IPC, are fully proved on the basis of the prosecution evidence. There was specific demand of motorcycle by accused-persons and Rekha was subjected to cruelty or harassment on account of demand of motorcycle. The statement of PW-3 Usha Sardar, PW-6 Tapashrai and PW-15 Mukesh Kumar Barman were also referred and contended that even a day before the date of incident the accused Bhupenpal came to his in laws house and requested PW-3 Usha Sardar to give him motorcycle otherwise he and his wife both will be ousted from their house by his mother Maya Devi. Therefore, it is contended that there is sufficient evidence on the record to prove the guilt of offence under Section 304B, IPC, against Maya Devi and the trial court rightly convicted and sentenced her and her appeal is liable to be dismissed.

So far as the State's leave to appeal against accused Bhupenpal is concerned, the learned Public Prosecutor could not point out any such illegality or perversity in the impugned order passed by the trial

court so as to interfere in the order of acquittal. All the prosecution witnesses stated that Rekha was administered poison by her mother-in-law. Bhupenpal, in his statement before the trial court under Section 313, Cr.P.C., stated that he was on duty at Kota and he was not even present at the place of incident at the relevant time. The trial court also considered the prosecution evidence and that there is no evidence against the accused Bhupenpal in respect of offence under Section 498A and 304B IPC. The trial court also recorded a finding that the presence of accused Bhupenpal is also doubtful and consequently acquitted the accused-appellant. The scope of Section 378, Cr.P.C., to interfere in the order of acquittal has been considered by the Hon'ble Supreme Court in number of cases and it has been observed that even if two views are possible on the basis of the prosecution evidence then a view which is favourable to the accused should be adopted and the order of acquittal should be interfered with only when there are compelling and substantial reasons for doing so.

The Hon'ble supreme Court in **State of Madhya Pradesh v. Bacchudas @ Balaram & Others (2007 AIR SCW**

1305), held as under:-

"9. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. (See Bhagwan Singh v. State of M.P. 2003 (3) SCC 21). The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so."

In view of the above discussion in respect of facts of the case and position of law, as laid down by the Hon'ble Supreme Court, I do not find any merit in the application for leave to appeal filed by the State

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against the accused Bhupenpal and the same is accordingly dismissed.

I have heard the learned counsel for both the parties in respect of accused Smt. Maya Devi and minutely scanned the impugned judgment as well as the record of the trial court.

Exhibit P-10, a written-report, was lodged by PW-17 Deepankar Mandal about death of Rekha Devi. The marriage of Rekha Devi with accused Bhupen took place about one-and-half-year ago from the date of incident i.e. 19.9.2000. As per the postmortem-report (Exhibit P-9), the cause of death, as opined is as under:-

"On the basis of above mentioned findings, in our opinion, Death is due to Asphyxia caused by suspected poisoning. However viscera are preserved (Stomach, Liver, Spleen, both kidney) and send for chemical examination at FSL Jaipur, through SHO, P/S Bhanwargarh and final opinion will be given after receiving the Report of FSL."

FSL Report (Exhibit P-14) dated 14.11.2000 shows the following result of analysis:-

"On chemical examination, portions of viscera (1-4), ..not legible - torn, (5), Cuttings of Exhibits (7-8) from five packets marked E,D,A,B and C

respectively gave positive test for the presence of Chloropyrophos insecticide and gave negative tests for metallic poisons, cyanide, alkaloids, barbiturates and tranquillizers.

The portions of viscera (1-4) from two packets marked E and D gave negative tests for ethyl and methyl alcohol."

Accused Maya Devi has been convicted under Section 304B, IPC as well as 498A, IPC therefore, it will be relevant to refer both the Sections, which are as under:-

"304B. Dowry death.- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation.- For the purposes of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

"498A. Husband or relative of husband of a woman subjecting her to cruelty.-

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty, shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.-For the purposes of this section, "cruelty" means-

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

Section 113-B of the Evidence Act is also relevant for the purpose of Section 304-B, IPC, therefore, Section 113-B, IPC is also reproduced as under:-

"113B. Presumption as to dowry death.- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation.- For the purposes of this Section, "dowry death" shall have the same meaning as in Section 304B of the

Indian Penal Code (45 of 1860)."

In order to convict an accused for an offence under Section 304B, IPC, the following ingredients must be satisfied in a case:-

- (1) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances;
- (2) such death must have occurred within 7 years of her marriage;
- (3) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or by relatives of her husband;
- (4) such cruelty or harassment must be for or in connection with demand of dowry.

If the aforementioned ingredients are established by acceptable evidence in a case then such death of a woman shall be called "dowry death" and such husband or his relative will be deemed to have caused her death. It is relevant to mention that punishment for the offence of dowry death u/s.304B, IPC, is imprisonment of not less than 7 years, which may extend to imprisonment for life. Unlike under

Section 498A, IPC, husband or relative of husband of a woman subjecting her to cruelty shall be liable for imprisonment for a term which may extend to three years and shall also be liable to fine. Normally, in a criminal case accused can be punished for an offence on establishment of commission of that offence on the basis of evidence, may be direct or circumstantial or both. But in case of an offence under Section 304B, IPC, an exception is made by deeming provision as to nature of death as "dowry death" and that the husband or his relative, as the case may be, is deemed to have caused such death, even in the absence of evidence to prove these aspects but on proving the existence of the ingredients of the said offence by convincing evidence. Hence, there is need for greater care and caution, that too having regard to the gravity of the punishment prescribed for the said offence, in scrutinizing the evidence and in arriving at the conclusion as to whether all the above mentioned ingredients of the offence are proved by the prosecution.

The learned counsel for the accused-appellant does not dispute that the first two ingredients of the offence under Section 304B, IPC, are fully proved in

the case, but so far as the third and fourth ingredients, as discussed above, that Rekha was subjected to cruelty or harassment by her husband or by the relatives of her husband soon before her death, and said cruelty or harassment must be for or in connection with demand of dowry, are concerned, it is contended on behalf of the appellant that the same are not proved and there is no consistent evidence in this regard against the appellant.

In view of the above position of law, it is now necessary to discuss the prosecution evidence in respect of two ingredients of the offence under Section 304B, IPC, that she was subjected to cruelty or harassment soon before her death by the appellant Maya Devi and the said cruelty or harassment was for or in connection with the demand of dowry.

PW-3 Usha Sardar, the mother of Rekha, stated that Rekha was married with Bhupenpal. She gave colour television, single bed etc. in the dowry at the time of marriage. Her brother had told that they will give motorcycle when next agriculture crop will come. The agriculture crop was not good, therefore, they could not give motorcycle. She further stated that initially

for about six months the behaviour of in-laws of Rekha with her was good but thereafter they started beating her and use to tell her to bring motorcycle. On Monday Bhupenpal came to her house from Kota and stated that in case they will not give a motorcycle by tomorrow then his mother will oust him and their daughter from the house. On next day, they heard that their daughter has been killed by administering poison. The statement of Usha Sardar shows that soon before the death of Rekha her husband Bhupenpal had come to her house and stated that they should give motorcycle by tomorrow otherwise his mother will oust him and his wife from the house. It is relevant to mention that there is no allegation that Maya Devi assaulted Rekha on account of demand of motorcycle. Not a single word has been stated in her statement about assault, cruelty or harassment by Maya Devi with Rekha. PW-4 Kiranrai is maternal uncle of Rekha, who also stated that they promised to give motorcycle after some time but they could not give. He also stated that Rekha was harassed by her in-laws in her marital house and she was sent to her parental house and she lived with him also. However, Rekha was sent back at her marital house. The same statement has been given by PW-6 Tapashrai, the another maternal uncle of Rekha. All the three

witnesses, PW-1 Usha Sardar, PW-4 Kiranrai and PW-6 Tapashrai, have stated that in-laws of Rekha used to demand motorcycle but they have not stated that Rekha was subjected to cruelty or harassment on this account. PW-3 Usha Sardar has only stated that accused Bhupenpal came and met her and told that they should give motorcycle by tomorrow otherwise they will be ousted by his mother from the house. PW-9 Vishnupad, PW-10 Vibhuti Mandal and PW-15 Mukesh Kumar, have stated that when they were going and passing nearby the house of Rekha, they heard some hue and cry and then they entered the house; they saw Rekha, who told them that her mother-in-law has administered poison on her person by mixing the same in the rice. All the three witnesses have not stated about any harassment or cruelty soon before the death of Rekha on account of demand of dowry.

PW-7 Bhaven Dhali and PW-8 Shishir are independent witnesses in the case. They stated that they are neighbours of accused-persons. The in-laws of Rekha used to quarrel with her for demand of dowry but they have not stated any date or month or any specific instance or manner of cruelty or harassment with deceased. PW-10 and PW-11 both have not stated about

any harassment or cruelty with Rekha by accused persons for or in connection with demand of dowry at any point of time. PW-11 specifically stated that accused never made any demand of dowry in his presence.

The above discussion of prosecution evidence reveals that although accused-appellant raised demand of motorcycle in dowry at the time of marriage but there is no consistent evidence to prove that appellant assaulted deceased soon before her death for or in connection with demand of dowry. The death of Rekha was caused within seven years from her marriage and it was abnormal also. But there is no consistent evidence whether Rekha committed suicide by taking poison at her maternal uncle's field or she was administered poison directly or by mixing it in rice, but even if her death is treated as suicide then also it is included in dowry death, therefore her abnormal death is proved but in absence of specific evidence regarding assault or harassment of deceased by accused soon before her death for or in connection with demand of dowry, the charge under Section 304-B, IPC, was not proved and the learned trial court has committed a serious illegality in convicting the accused for the offence under Section 304-B, IPC. The judgment of the

trial court to that extent is liable to be set aside. So far as order of trial court convicting the accused-appellant under Section 498-A, IPC, is concerned, the same does not call for any interference by this Court.

Consequently, the leave to appeal filed by the State against accused Bhupenpal is rejected. The appeal filed by appellant Smt. Maya Devi is partly allowed. Her conviction under Section 304-B, IPC, is set aside but under Section 498-A, IPC, is maintained. She has already remained in custody for about 4 years 9 months, therefore, she has already completed her sentence of imprisonment awarded under Section 498-A, IPC. She is in jail, therefore, she may be set at liberty forthwith if her custody is not required in any other case.

(Narendra Kumar Jain), J.

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